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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALBERTO MIGUEL OTINIANO, Defendant and Appellant.	G040533 (Super. Ct. No. 06NF2124) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela Ratner Sobeck, Assistant Attorney General, and Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

* * *

Shortly after being employed as a certified nursing assistant at West Anaheim Medical Center, defendant Alberto Miguel Otiniano engaged in several instances of inappropriately touching female patients (counts 1 through 4). In addition, over a period of several years, he sexually abused his granddaughter (counts 5 through 7) and, on one occasion, one of her playmates (count 8). We relate the relevant details in our discussion.

A jury convicted defendant on all eight counts: sexual penetration by a foreign object of a victim "unconscious of the nature of the act" (Pen. Code, § 289, subd. (d); count 1; all further statutory references are to the Penal Code), three counts of sexual battery on an institutionalized victim (§ 243.4, subd. (b); counts 2, 3, and 4); continuous sexual abuse of a child under 14 (§ 288.5, subd. (a); count 5), and three counts of lewd act on a child under 14 (§ 288, subd. (a); counts 6, 7, and 8). The trial court sentenced defendant to 42 years to life, consisting of two consecutive 15 years to life terms for counts 6 and 8, a concurrent 15 years to life term for count 7, a middle term of 12 years for count 5, and concurrent middle terms on counts 1, 3, and 4. The court stayed imposition of sentence on count 2 (§ 654).

Defendant's appeal contends that substantial evidence fails to support the convictions on counts 1 through 4 and that convictions on counts 5 and 6 were for a single act and cannot be separately punished under section 654. We disagree and affirm the judgment.

DISCUSSION

1. Substantial evidence supports the finding that defendant's conduct met the requirements of section 289.

Section 289, subdivision (d) provides:

"Any person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, 'unconscious of the nature of the act' means incapable of resisting because the victim meets one of the following conditions:

(1) Was unconscious or asleep.

(2) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose."

Defendant contends that this section does not apply because the victim in count 1 was not asleep or unconscious. But this is not the only definition satisfying the statute. In fact, the trial court only instructed the jury with the definition contained in subdivision (d)(4). The victim, Jane Doe #1, testified that defendant began what appeared to be legitimate cleaning and then inserted his finger into her vagina. As the Attorney General points out, the "professional purpose" in subdivision (d)(4) is to be broadly construed. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 775.) Here defendant created the impression that his services were part of his job and then, suddenly, engaged in the offensive conduct. This constitutes substantial evidence of "fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose." (§ 289, subd. (d)(4).)

2. Substantial evidence supports the finding that defendant's conduct met the requirements of section 243.4.

Relevant portions of section 243.4 provide:

"(b) Any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. . . .

. . .

"(f) As used in subdivisions (a), (b), (c), and (d), 'touches' means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense.

"(g) As used in this section, the following terms have the following meanings:

(1) 'Intimate part' means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.

(2) 'Sexual battery' does not include the crimes defined in Section 261 or 289.

(3) 'Seriously disabled' means a person with severe physical or sensory disabilities.

(4) 'Medically incapacitated' means a person who is incapacitated as a result of prescribed sedatives, anesthesia, or other medication.

(5) 'Institutionalized' means a person who is located voluntarily or involuntarily in a hospital, medical treatment facility, nursing home, acute care facility, or mental hospital."

Defendant argues that his contact with the three hospital patients fails to meet the requirements of the statute and that his convictions on counts 2 through 4 should be reduced to simple battery. We disagree.

The statute requires that the contact either is skin to skin or through the clothing of the person committing the touching. Count 2 also involved the victim identified as Jane Doe #1. She testified that around 8:00 p.m. defendant entered her room alone and proceeded to clean, first her underarms, then her breast with a wash cloth. Thereafter, he cleaned her navel and pubic area, then "he started cleaning around [her] vagina and all of a sudden his finger was inserted into [her] vagina . . . ." She did not recall to what point defendant used the washcloth. Although, on prior occasions, when defendant cared for her he wore gloves, he did not in this instance.

Defendant argues that, because he was using a washcloth during the touching, there was no skin to skin contact nor was the contact through his "clothing." But, whether or not this contact violated the statute, the insertion of the finger into the victim's vagina was not through a washcloth. This touching provided the basis for the prosecution's theory, not only under count 1 but also under count 2 and, as a result, the trial court suspended sentence on count 2 under section 654.

The statute also requires that the touching be with an "intimate part," which is defined as "the sexual organ, anus, groin, or buttocks of any person, and the breast of a female." (§ 243.4, subds. (b), (g)(1).) Count 3 involved Jane Doe #2. She testified that defendant, under circumstances similar to those involving Jane Doe #1, started to rub lotion on her legs. When his hand moved "[v]ery close" to her vagina, she pushed him with her leg "for him to stay away." Defendant's hand got within two fingers from her vagina. Defendant argues that this did not constitute the touching of the victim's sexual organs. But defendant ignores that the definition of "intimate part" also includes the groin. There was substantial evidence to support the jury's determination that the touching violated the statute.

Subdivisions (g)(3) and (4) required that the victims be "seriously disabled" or "medically incapacitated." (§ 243.4, subd. (g)(3), (4).) Defendant argues the three victims in counts 2 through 4 did not qualify under these subdivisions. Again, substantial evidence supports a contrary conclusion. Count 2 involved Jane Doe #1. She was physically disabled, needing to use a wheel chair, and was on drugs to alleviate her pain. She was unable to move freely. Count 3 involved Jane Doe #2. She had just had breast surgery the day of the sexual battery. She also used drugs to alleviate her pain. Count 4 involved Jane Doe #3. She had an appendectomy less than 24 hours before defendant's inappropriate conduct. She was on pain medication and testified at one point that she was "[q]uite disabled" and "was hurting all the time." Again the condition of all three of these victims provides substantial evidence to support the jury's finding that they were both seriously disabled and medically incapacitated.

3. Counts 5 and 6 were appropriately punished separately.

Count 5 involves defendant's continuous sexual abuse of his granddaughter, a child under 14, under section 288.5, subdivision (a). This was based on a six-year period. Two of the counts of lewd acts under section 288, subdivision (a) (counts 6 and 7), were based on sexual abuse of the same child during a later period. Claiming this involved an indivisible transaction, defendant contends the separate punishment violated section 654. As the Attorney General points out, this argument is rebutted by *People v. Torres* (2002) 102 Cal.App.4th 1053, where the court discussed the interplay between section 288.5 and other specific felony sex offenses and held that the prosecution was permitted "to allege and prove *not only* a continuous sexual abuse count, but also specific felony offenses commensurate with the defendant's culpability, subject only to the limitation that the defendant may not be *convicted* of both continuous sexual abuse and specific felony sex offenses committed in the same period." (*Id.* at p. 1059.) Here the offenses were alleged and proved to have taken place during different periods.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.